equivalent to actual knowledge, there can be no reliance on the agent and hence no warranty.[8] It is true that if the only ground for refusing recovery is lack of capacity to contract imposed by the legislature, and the agent warrants that capacity, he should be personally liable. But it is difficult to reconcile this view with the corporation's liability for the torts and crimes of its agents, and no court seems to refuse recovery on this ground alone. On the other hand, if a corporation is relieved on the ground that its *ultra vires* contracts are so illegal that even an innocent party cannot sue on them, there seems less cause to allow recovery against another innocent party on rights arising from the same transaction.[9] If, as seems the most desirable view, recovery is denied only when a real public policy discourages the particular transaction,[10] it would seem that the same policy would equally prevent the creation of all rights and liabilities.

THE USE OF ANCIENT DOCUMENTS IN EVIDENCE. — The fact that a document is ancient affects its availability in evidence in several ways. In the first place the admission of such a document under certain conditions is allowed without extrinsic proof of its execution and authorship. The principal support in reason for this exception to the general rule is necessity. After many years it may be impossible to produce the author, proof of his handwriting, witnesses of the execution, or any evidence bearing on the genuineness of the document. There is also a probability that instruments in writing are what they purport to be, particularly if formal in nature. While this is not enough in modern documents, in one which has remained so long where a genuine one would be expected, the cumulative evidence of its probable validity is sufficiently weighty not to require further proof. To qualify for admission under the rule, the document must be over thirty years old, must come from a natural custody, and there must be nothing suspicious about its appearance.[1] A further requirement sometimes imposed, if it is a deed or will, is that there must be possession of land according to its terms, to give it some corroboration.[2] But to-day the weight of authority seems against that requirement;[3] in other cases it has been modified by allow-

[8] If the doctrine of constructive notice were similar to that of constructive notice of incumbrances, and imposed solely for the benefit of third parties, liability of the agent on an implied warranty would not be excluded because it would injure no third parties.

[9] St. Louis, Vandalia & Terre Haute R. Co. *v.* Terre Haute & Indianapolis R. Co., 145 U. S. 393, 12 Sup. Ct. 953.

[10] See 23 HARV. L. REV. 495; 24 *id.* 534. At the present time no court will enforce an *ultra vires* contract which is wholly executory. Garrett *v.* Kansas City Coal Mining Co., 113 Mo. 330, 20 S. W. 965; Jemison *v.* Citizens' Savings Bank, 122 N. Y. 135, 25 N. E. 264; Simpson *v.* Building and Savings Association, 38 Oh. St. 349.

[1] This is the rule laid down in all the cases. Applegate *v.* Lexington & Carter County Mining Co., 117 U. S. 255, 6 Sup. Ct. 742; Woodward *v.* Keck, 97 S. W. 852 (Tex. Civ. App.). Proper custody was not shown in Swafford *v.* Herd's Adm'r, 23 Ky. L. Rep. 1556, 65 S. W. 803; Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017. The appearance was suspicious in Wright *v.* Hull, 83 Oh. St. 385, 94 N. E. 813; O'Neal *v.* Tennessee Coal, Iron & R. Co., 140 Ala. 378, 37 So. 275.

[2] McKinnon *v.* Bliss, 21 N. Y. 206; Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292.

[3] Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; Nicholson *v.* Eureka Lumber Co., 156 N. C. 59, 72 S. E. 86; Harlan *v.* Howard, 79 Ky. 373.

ing the substitution of any corroborative evidence.[4] A recent case illustrates the modern tendency to discard it. *Lacey* v. *Southern Mineral Land Co.*, 60 So. 283 (Ala.). The result of the general rule is that certain facts whose relevancy is clear but usually excluded as insufficient, are admitted to prove that the document was executed in due form and delivered by the man whose name is signed. It follows that his handwriting may be used for comparison if this evidence of the genuineness of the deed is not rebutted.[5] The acts of delivery and acceptance of the deed may also be evidence, when proved, of certain inferential facts. For example, from a lease may be inferred possession at the time in the lessor.[6] In inquiring into occurrences of a past generation, courts may well be liberal in allowing more slender inferences than are usually tolerated.

But if a document is ancient it may also be evidence of facts stated therein, as an exception to the hearsay rule. When a deed purports to be executed under a power of attorney, it is usually accepted as evidence of that fact.[7] The execution of the deed would tend somewhat to prove a valid power to execute it,[8] but the recital of the power seems really a material part of the evidence. A deed reciting a previous conveyance is also admitted, as evidence of that conveyance, at any rate when the previous deed is shown to be lost.[9] Mere inference from the grantor's having executed the deed is rather slight proof of there having been a conveyance to him. The recitals appear to be the material part of the evidence. The court in the principal case was liberal, allowing a conveyance to an assignee in bankruptcy to be proved in this manner.[10] As another example of hearsay, pedigree recitals, principally statements of relationship taken as evidence of inheritance or dower rights, have also

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[4] Johnson *v.* Timmons, 50 Tex. 521; White *v.* Farris, 124 Ala. 461, 27 So. 259; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371. See Cunningham *v.* Davis, 175 Mass. 213, 220, 56 N. E. 2, 4.

[5] Bell *v.* Brewster, 44 Oh. St. 690, 10 N. E. 679; Woodward *v.* Keck, *supra*.

[6] Because the lessor would not be likely to deliver nor the lessee to accept a lease, unless the lessor had possession. Bristow *v.* Cormican, 3 App. Cas. 641; Floyd *v.* Tewkesbury, 129 Mass. 362. It is to be observed that in either case the inference is to the belief of a human being, and thence to a fact. See 26 HARV. L. REV. 151–153. If, therefore, the delivery of the deed is a human utterance intended to convey thought and not merely an act, this class of cases should be properly classified under the exception to the hearsay rule discussed in the text. It seems that the mere fact that legal consequences are attached to written words, making them a "legal act," should not exclude them from the hearsay rule. Thus the execution of a contract to sell grain with a warranty should not be admissible evidence of the quality of the grain. And in the case of the ancient lease it is not even proved that legal consequences did attach to the execution of the lease. But delivery is not an utterance, and it seems that it is not an act whose apparent purpose is to convey the idea that the grantor is in possession. At any rate the act of the lessee in accepting the deed is not intended to convey thought at all. See 26 HARV. L. REV. 148.

[7] Doe d. Clinton *v.* Phelps, 9 Johns. (N. Y.) 169; Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014.

[8] This is the argument in Watrous *v.* McGrew, 16 Tex. 506; Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612, and cases cited note 7, *supra*. But in practically all the cases there was a recital of a power. The recital is relied on in Butterfield *v.* Miller, 195 Fed. 200.

[9] Deery *v.* Cray, 5 Wall. (U. S.) 795, and cases cited. The use of recitals as evidence of claims of title in connection with adverse possession is not hearsay.

[10] Such official acts are sometimes said to be presumed. Chanler *v.* Wilson, 77 Me. 76. But in the principal case the recital was expressly relied on.

been admitted.[11] This may well be distinguished from the regular pedigree exception.[12] Again, recitals of boundaries in ancient deeds,[13] or diagrams in ancient maps,[14] are often admitted to show boundaries as they then existed. This, too, is distinguishable from the more general exception as to boundaries.[15] As may be noted, this admission of hearsay in ancient documents occurs chiefly in connection with title to land,[16] which often involves issues as to rights existing years ago. These often cannot be proved in any other way, and the continuance of evidence, apparently reliable, for so long a time, furnishes a good basis for a hearsay exception.

RECENT CASES.

ADOPTION — DESCENT AND DISTRIBUTION — RIGHT OF FATHER TO INHERIT FROM SON ADOPTED BY ANOTHER. — An adopted son died intestate leaving property acquired solely from his deceased adoptive father. The natural father claimed from the son's widow a father's share in the estate. A statute provided that the foster-parent and the adopted child should "sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation" while the natural parents are "relieved of all parental duties . . . towards . . . the child . . . and have no right over it." *Held*, that the natural father inherits nothing from his son. *In re Jobson's Estate*, 128 Pac. 938 (Cal.).

In many of the states the adoption statutes provide expressly as to inheritance both by and from an adopted child. MASS. REV. LAWS, 1902, c. 154, § 7; N. Y. CONSOL. LAWS, c. 19, § 114, p. 1077. Under statutes providing that the adopted child shall be heir to the foster-parent but silent as to the foster-parent's rights, it has been held that the foster-parent does not inherit on the ground that the statute impliedly provides otherwise. *Hole* v. *Robbins*, 53 Wis. 514, 10 N. W. 617; *Schafer* v. *Eneu*, 54 Pa. St. 304. *Cf.* TIFFANY, PER-

[11] Bowser *v.* Cravener, 56 Pa. St. 132; Rollins *v.* Atlantic City R. Co., 73 N. J. L. 64, 62 Atl. 929, and cases cited *infra*, note 13. *Contra*, Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632. Where possession of land under the deed must be shown there it may be argued that conclusions therefrom are not hearsay. In Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525, no question of land or inheritance was involved, but mere pedigree.

[12] Ardoin *v.* Cobb, 136 S. W. 271 (Tex., Civ. App.). See Wilson *v.* Braden, 56 W. Va. 372, 375, 49 S. E. 409, 410. The two were confused in Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, and Fulkerson *v.* Holmes, 117 U. S. 389, 6 Sup. Ct. 780. The court in rejecting the evidence did not take notice of the authority of a document in Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174.

[13] Horgan *v.* Town Council of Jamestown, 32 R. I. 528, 80 Atl. 271; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95. Some cases admit this as evidence of the ancient reputation as to the boundary. Village of Oxford *v.* Willoughby, 181 N. Y. 155, 73 N. E. 677; Dobson *v.* Finley, 8 Jones L. (N. C.) 495.

[14] Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333; Burns *v.* United States, 160 Fed. 631.

[15] Pierce *v.* Schram, 53 S. W. 716 (Tex. Civ. App.).

[16] Other instances of hearsay in connection with land are found in King *v.* Little, 1 Cush. (Mass.) 436; Coleman *v.* Bruch, 132 N. Y. App. Div. 716, 117 N. Y. Supp. 582. In Hamershlag *v.* Duryea, 58 N. Y. App. Div. 288, 68 N. Y. Supp. 1061, statements of acts were used to prove adverse possession. In Massachusetts and Maine such hearsay is sufficient evidence of a pauper's residence to charge a town with his support. Inhabitants of Ward *v.* Inhabitants of Oxford, 8 Pick. (Mass.) 476; Inhabitants of Oldtown *v.* Inhabitants of Shapleigh, 33 Me. 278.